

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
American Telephone & Telegraph Company :
AFFIDAVIT OF MAILING :
for Redetermination of a Deficiency or for Refund :
of Corporation Tax under Article 9, Section 183 of :
the Tax Law for the Years 1970 through 1973, and :
under Article 9, Section 184 of the Tax Law for :
the Periods Ended December 31, 1969 through :
December 31, 1972. :

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 13th day of November, 1981, he served the within notice of Decision by certified mail upon American Telephone & Telegraph Company, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

American Telephone & Telegraph Company
c/o Clarin S. Schwartz
195 Broadway
New York, NY 10001

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
13th day of November, 1981.

Chamie A. Shapiro

Jay Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

November 13, 1981

American Telephone & Telegraph Company
c/o Clarin S. Schwartz
195 Broadway
New York, NY 10001

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1090 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
AMERICAN TELEPHONE AND TELEGRAPH COMPANY	:	DECISION
for Redetermination of a Deficiency or	:	
for Refund of Corporation Tax under	:	
Article 9, Section 183 of the Tax Law	:	
for the Years 1970 through 1973, and	:	
under Article 9, Section 184 of the Tax	:	
Law for the Periods Ended December 31,	:	
1969 through December 31, 1972.	:	

Petitioner, American Telephone and Telegraph Company, 195 Broadway, New York, New York 10007, filed a petition for redetermination of a deficiency or for refund of corporation tax under Article 9, Section 183 of the Tax Law for the years 1970 through 1973, and under Article 9, Section 184 of the Tax Law for the periods ended December 31, 1969 through December 31, 1972 (File No. 15110).

On November 14, 1978, petitioner notified the Tax Appeals Bureau, in writing, that it consented to the submission of this matter to the State Tax Commission for a decision, without the necessity of a formal hearing.

On June 21, 1978, petitioner and Counsel for the Department of Taxation and Finance entered into a written Stipulation of Facts.

ISSUES

I. Whether the following constituted assets employed in petitioner's business in New York, properly includable in the measure of its capital stock in this State for purposes of section 183 of the Tax Law: (a) advances to affiliated corporations located outside New York, and interest receivable therefrom; (b) advances to 195 Broadway Corporation; (c) temporary cash invest-

ments, and interest receivable therefrom; (d) obligations of the Federal National Mortgage Association; (e) interest receivable from obligations of the Federal Intermediate Credit Bank, Banks for Cooperatives and the Federal Home Loan Bank; (f) New York State and New York municipal obligations and interest receivable therefrom; (g) interest receivable with regard to obligations of states and municipalities outside New York; (h) interest receivable with respect to refunds of Federal income tax; (i) dividends receivable.

II. Whether the following constituted gross earnings from sources within this State for purposes of section 184 of the Tax Law: (a) interest income from advances to affiliated corporations; (b) interest income from temporary cash investments; (c) interest income from Federal National Mortgage Association debentures and discount notes.

III. Whether the allocation of petitioner's assets to New York pursuant to section 183 of the Tax Law is in violation of the Commerce Clause and the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

IV. Whether the allocation of petitioner's interest income to New York pursuant to section 184 of the Tax Law is in violation of the Commerce Clause and the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

FINDINGS OF FACT

1. Petitioner, American Telephone and Telegraph Company ("American"), timely filed annual reports of franchise tax on capital stock under section 183 of the Tax Law, for the years 1970 through 1973. It also filed quarterly reports of franchise tax on gross earnings under section 184 of the Tax Law, for the taxable periods ended December 31, 1969 through December 31, 1972.

2. American duly executed consents extending the period of limitation within which to issue an assessment, with respect to the reports filed by it, to March 1, 1976.

3. On December 24, 1975, the Corporation Tax Bureau issued notices of deficiency against American for the tax periods in issue as follows:

	<u>Section 183</u>	<u>Section 184</u>	<u>Total</u>
Additional Tax	\$ 9,818,652.00	\$2,302,499.76	\$12,121,151.76
Interest	<u>2,634,517.01</u>	<u>632,505.50</u>	<u>3,267,022.51</u>
Totals	\$12,453,169.01	\$2,935,005.26	\$15,388,174.27

American timely filed two petitions with respect to said notices of deficiency.

4. American was incorporated in 1885 under the law of the State of New York as a transmission company. American has its principal executive offices at 195 Broadway, New York, New York 10007 and its principal general corporate records were maintained by its employees thereat.

5. American is the parent company of a group of corporations (commonly known as the "Bell System"). During the years 1969 through 1972, American had twenty-one principal telephone subsidiaries, as well as a number of other subsidiaries, the most important of which were Western Electric Company, Incorporated and Bell Telephone Laboratories, Incorporated. In addition, American also wholly owned 195 Broadway Corporation, Transpacific Communications, Incorporated, and several other corporations, and partially owned several other corporations. Also included in the Bell System were The Southern New England Telephone and Telegraph Company and Cincinnati Bell, Inc. in which American had minority interests. These twenty-three telephone companies (the twenty-one principal telephone subsidiaries, The Southern New England Telephone and Telegraph Company and Cincinnati Bell, Inc.) are hereinafter referred to as "telephone subsidiaries." The principal business of American and its telephone

subsidiaries was that of furnishing communications services, mainly telephone services, throughout the United States except in Alaska and Hawaii. American's principal operating telephone subsidiaries serve approximately 80 percent of the nation's telephones and operated in the District of Columbia and in all states except Alaska and Hawaii. American, through its Long Lines Department (a division of American), operated a network of cable, wire and radio circuits and related equipment to provide for interconnection among the communications systems of its telephone subsidiaries and other communications systems in the United States and for interconnection with those in most other countries throughout the world. American's telephone subsidiaries furnished local and toll service in the areas in which they operated and furnished interstate toll service to outside areas through interconnection with American's Long Lines Department and other telephone companies. American's General Administrative Department provided administrative, financial, legal, executive, budget and related services for American. In addition, it rendered advice and assistance in these areas to the corresponding departments and organizations of the telephone subsidiaries as more fully described in paragraph 6. Other communications services offered by American and its telephone subsidiaries included data transmission, transmission of radio and television programs, and private line voice and teletypewriter services.

6. During the years 1969 through 1972, agreements between American and each of the operating telephone subsidiaries were in effect covering services, licenses and privileges (hereinafter referred to as the "license contracts"). Under each license contract American agreed (1) to maintain arrangements whereby telephones and related equipment may be manufactured under patents owned or controlled by American and may be purchased by the operating telephone

subsidiaries at a reasonable price, (2) to conduct research in telephony and to make available to the operating telephone subsidiaries the benefits derived therefrom, (3) to maintain connections between an operating telephone subsidiary's telephone system and the other operating telephone subsidiaries of the Bell System, and (4) to furnish advice and assistance in general engineering, plant, traffic, operating, commercial, accounting, patent, legal, administrative and other matters pertaining to the conduct of the operating telephone subsidiaries' business. American also specifically agreed to furnish:

"advice and assistance in any financing required to be done by the Licensee operating telephone subsidiary in the extension, development or improvement of its telephone system within its said territory and in the general matter of its finances; aid in securing funds on fair terms, as and when needed for new construction and other expenditures, but not at any time, to a greater extent than the then condition of the finances and credit of the Licensor American may permit; active assistance in the marketing of the Licensee's securities; and such other necessary financial support and assistance in the premises as will tend to serve the best interests of both Companies." Sec. 5(b) of Agreement between American Telephone and Telegraph Company and the New Jersey Bell Telephone Company.

Language substantially similar to that quoted above was contained in all the license contracts between American and the other operating telephone subsidiaries. Each of the operating telephone companies paid American a license contract fee in the amount of 1% of its gross earnings in consideration of American's undertakings and commitments under the license contract. During the years 1969 through 1972, approximately 28% of the services described above were rendered by American in New York.

7. During the years involved herein, American owned all of the shares of the telephone subsidiaries except seven, five in which it had a majority interest which ranged as follows: New England Telephone and Telegraph Company, 69.52 - 85.41%; Illinois Bell Telephone and Telegraph Company, 99.32 - 99.33%; The Mountain States Telephone and Telegraph Company, 86.75 - 87.76%; Pacific

Northwest Bell Telephone Company, 89.15 - 89.22%; and the Pacific Telephone and Telegraph Company, 89.7%. In addition, American had minority interests in two affiliated companies, The Southern New England Telephone Company and Cincinnati Bell Inc., which approximated 16.8% and 25.7%, respectively, during the years 1969 through 1972. These twenty-three operating telephone companies served the following areas during the years involved herein:

<u>NAME</u>	<u>AREA SERVED</u>
New England Telephone and Telegraph Company	Maine, Massachusetts, New Hampshire, Rhode Island, Vermont
The Southern New England Telephone Company	Connecticut
New York Telephone Company	New York and a portion of Connecticut
New Jersey Bell Telephone Company	New Jersey
The Bell Telephone Company of Pennsylvania	Pennsylvania
The Diamond State Telephone Company	Delaware
The Chesapeake and Potomac Telephone Company	District of Columbia
The Chesapeake and Potomac Telephone Company of Maryland	Maryland
The Chesapeake and Potomac Telephone Company of Virginia	Virginia
The Chesapeake and Potomac Telephone Company of West Virginia	West Virginia
Southern Bell Telephone and Telegraph Company	Florida, Georgia, North Carolina, South Carolina
South Central Bell Telephone Company	Alabama, Kentucky, Louisiana, Mississippi, Tennessee
The Ohio Bell Telephone Company	Ohio

<u>NAME</u>	<u>AREA SERVED</u>
Cincinnati Bell Inc.	Cincinnati, Ohio and portions of Kentucky and Indiana
Michigan Bell Telephone Company	Michigan
Indiana Bell Telephone Company, Incorporated	Indiana
Wisconsin Telephone Company	Wisconsin
Illinois Bell Telephone Company	Illinois and a portion of Indiana
Northwestern Bell Telephone Company	Iowa, Minnesota, Nebraska, North Dakota, South Dakota
Southwestern Bell Telephone Company	Arkansas, Kansas, Missouri, Oklahoma, Texas and a portion of Illinois
The Mountain States Telephone and Telegraph Company	Arizona, Colorado, Idaho, Montana, New Mexico, Utah, Wyoming and portions of Texas and Oregon
Pacific Northwest Bell Telephone Company	Oregon, Washington and a portion of Idaho
The Pacific Telephone and Telegraph Company (including its wholly-owned subsidiary, Bell Telephone Company of Nevada)	California, Nevada

8. American and its telephone subsidiaries were subject to regulation by the Federal Communications Commission with respect to interstate and foreign rates, lines and services, and other matters, including the maintenance of their books and records. American and its telephone subsidiaries were subject to and maintained their books and records in accordance with Part 31 of the Rules and Regulations of the Federal Communications Commission's Uniform System of Accounts for Class A and Class B Telephone Companies.

9. American's telephone subsidiaries were subject to regulation in every state in which they did business by a public service commission or other similar authority having regulatory jurisdiction over intrastate rates, services and other matters. With the exception of New York Telephone Company, American's telephone subsidiaries did not own any property within New York State, did not engage in any business in New York State and were not subject to regulation by the New York Public Service Commission. American had two other subsidiaries which held property in New York, Western Electric Company, Incorporated and 195 Broadway Corporation. During the years 1969 through 1972, American did not engage in any intrastate telephone transmissions in New York State. However, on occasion, calls originating in New York State to another point in New York State did travel interstate on Long Lines' equipment. American was not regulated by the New York Public Service Commission with respect to rates or services. American's physical property in New York State was (except for furniture and office equipment) operated by its Long Lines Department and was devoted to interstate business, and American was subject to the jurisdiction of the Federal Communications Commission with respect to such property.

10. In addition to its telephone subsidiaries, American also owned Transpacific Communications, Incorporated ("Transpacific") to which it advanced sums which were outstanding during the years 1969 through 1972. Transpacific was engaged exclusively in foreign commerce. It was incorporated in 1963 under the laws of Delaware as a wholly-owned subsidiary of American to own, construct, operate and maintain certain overseas communications systems in order to avoid subjecting American to the jurisdiction of foreign countries.

11. The corporation tax examiner's findings which are in issue herein are as follows:

a. The treatment of amounts advanced by American to certain of its affiliates which were located wholly outside of New York State, except for 195 Broadway Corporation, as being "held, managed and controlled" by American in New York as gross assets employed in American's business in New York State for purposes of the Capital Stock tax.

b. The treatment of interest receivable with respect to such advances as gross assets employed in American's business in New York State for purposes of the Capital Stock tax.

c. The treatment of interest received in connection with such advances as earnings from sources within New York State for purposes of the Gross Earnings tax.

d. The treatment of certain items in Account 116, "Temporary Cash Investments," as gross assets employed in American's business in New York State for purposes of the Capital Stock tax.

e. The treatment of interest receivable from certain items as gross assets employed in American's business in New York State for purposes of the Capital Stock tax.

f. The treatment of interest received in connection with certain items in Account 116 as earnings from sources within New York State for purposes of the Gross Earnings tax.

g. The treatment of "dividends receivable" by American from its affiliates as gross assets employed in American's business in New York State for purposes of the Capital Stock tax.

12. American made advances to twenty-three of its affiliated corporations wholly outside of New York State. American paid no franchise or other tax to any other state with respect to these advances. However, all of the telephone subsidiaries paid franchise or other taxes, based in whole or in part on a property factor, to the states in which their property was located. In addition, in twenty-two states, other than New York, American paid taxes on the portion of its income, including interest from the advances to its subsidiaries and from "Temporary Cash Investment" items, allocated to each state based on formulas which reflect property, payroll, sales or receipts factors or a combination thereof which are attributable to each state. However, in California,

American paid taxes on the basis of a combined report which reflected the elimination of interest income from subsidiaries in which American owned more than 50% of the stock. During the years 1969 through 1972, the allocation percentages ranged as follows:

	<u>LOW</u>	<u>HIGH</u>	<u>TOTAL</u>
1969	0.05%	5.20%	24.42%
1970	0.05%	5.51%	25.07%
1971	0.04%	5.20%	29.16%
1972	0.04%	5.24%	30.40%

13. American has been filing Capital Stock tax reports under Section 183 and its predecessors since their original enactment in 1888. Until the audit of the Capital Stock tax reports for the privilege years beginning January 1, 1970 through January 1, 1973, the basis upon which American has prepared its Capital Stock tax reports had not been questioned since 1923. Since 1910, American's advances to associated companies have been treated on the returns as gross assets employed in New York only to the extent that the debtors' assets have been allocated to New York. Since 1923, American's short-term investments have been treated on the returns as pre-employment capital and not assets employed in American's business in New York.

14. American has been filing Gross Earnings tax reports under Section 184 since the Section's original enactment in 1896. Until the audit of the thirteen Gross Earnings reports for the taxable periods ended December 31, 1969 through December 31, 1972, the basis upon which American has prepared its Gross Earnings tax reports has not been questioned since 1908. Since 1908, American has consistently excluded from its Gross Earnings tax reports interest on obligations issued by obligors located outside of New York from such reports.

15. The Bell System annually expends substantial sums in the construction of telephone plant to provide for the growth in telephone plant required by the demands of new customers and the increased usage of existing customers, to provide for the modernization and replacement of obsolete and worn existing plant, and to provide for the relocation of equipment caused when customers move from one location to another. In each of the years 1969, 1970, 1971 and 1972, the Bell System expended on construction approximately 5.75, 7.2, 7.6 and 8.3 billion dollars, respectively. Of these amounts, New York Telephone Company expended on construction in New York in the years 1969, 1970, 1971 and 1972 approximately 721, 997, 937 and 980 million dollars, respectively, and American's Long Lines Department expended on construction in New York in the years 1969, 1970, 1971 and 1972 approximately 19, 29, 54, and 9 million dollars, respectively.

16. American regularly advanced sums of money to all of the companies except New York Telephone Company in order to assist the telephone subsidiaries in financing huge construction expenditures and in other operations of their business. The examiner treated these advances as gross assets employed in American's business in New York. All of American's decision-making processes in regard to advances to subsidiaries by American transpired at American's principal office in New York City. All of the decisions made by the subsidiaries with respect to their borrowings transpired at their corporate headquarters outside of New York State. In the case of Transpacific, the number of advances and repayments and the total amounts thereof for the years 1969 through 1972 were as follows:

<u>Year</u>	<u>Advances</u>		<u>No.</u>	<u>Repayments</u>	
	<u>No.</u>	<u>Amount</u>		<u>No.</u>	<u>Amount</u>
1969	11	\$6,350,000	2		\$ 725,000
1970	12	6,800,000	2		9,725,000
1971	2	400,000	0		-0-
1972	0	-0-	4		1,700,000

17. Except for advances made to Cincinnati Bell, Inc., all of these advances were evidenced by demand notes bearing interest equal to the lowest prime rate charged by the Chase Manhattan Bank, First National City Bank (Citibank), or Manufacturers Hanover Trust Company. All notes are executed by the duly authorized officer of the borrowing subsidiary at the subsidiary's corporate headquarters outside of New York and sent to American in New York. In the case of Cincinnati Bell, Inc., advances were on open account payable within ten days after demand and in any event within twelve months after date. Interest on the advances was payable at American's New York office and was in fact paid on or before the tenth day of each succeeding month from the date of the advance until the advance was finally paid. All notes were returned to the borrowing telephone subsidiary upon repayment.

18. American's Treasury Department maintained custody of the notes at 195 Broadway, New York, New York. American received repayments of the notes and payments of interest in same day funds transferred or credited to its banks in New York by the borrower's corresponding bank. Amounts received in partial repayment of a note were recorded on the back of the note and were applied to reduce the outstanding balance of the note. Notes which were fully repaid were stamped "Paid" and were returned to the borrower when the interest on the last outstanding balance was paid which was generally the tenth day of the month following the month of repayment.

19. Advances were repaid by the borrowing telephone subsidiaries from time to time out of their operating revenue, out of the proceeds from the sale of their debt securities and stock to the public, or out of the proceeds from the sale of stock to American. Repayments out of operating revenues were generally more frequent and in amounts smaller than repayments out of the proceeds from the sale of securities and stock to the public or stock to American. In the case of Transpacific, advances were repaid from the proceeds of the sale of common stock to American or from operating revenues. During the years 1969 through 1972, New York Telephone Company, New Jersey Bell Telephone Company, New England Telephone and Telegraph Company, Illinois Bell Telephone Company and Southern Bell Telephone and Telegraph Company offered securities to the public. With the exception of New York Telephone Company, the telephone subsidiaries committed and in fact applied the proceeds from the sale of their securities to, among other things, the repayment of American's advances.

20. American regularly purchased stock from the telephone subsidiaries and the proceeds therefrom were used by the telephone subsidiaries to repay outstanding advances. Except for New York Telephone Company which applied the proceeds from the sale of its stock to American to the repayment of bank loans, commercial paper and other corporate purposes, the telephone subsidiaries generally applied the proceeds from the sale of stock to American to the repayment of advances from American.

21. On its Capital Stock tax reports for the privilege years beginning January 1, 1970, January 1, 1971, January 1, 1972, and January 1, 1973, American included portions of amounts advanced to 195 Broadway Corporation in its calculation of gross assets employed in American's business in New York on the basis of the monthly average of these amounts multiplied by 195 Broadway

Corporation's New York State stock allocation percentage. 195 Broadway Corporation's New York State stock allocation percentage applicable for each of the calendar years 1969 through 1972, as reported on its Franchise Tax reports (Form CT-3) filed for the years 1968 through 1971, were 94.0540%, 85.34393%, 81.77914%, and 71.38690%, respectively. 195 Broadway Corporation's New York State asset allocation percentages applicable for each of the calendar years 1969 through 1972, as reported on its Franchise Tax reports filed for the years 1968 through 1971, were 82.5383%, 69.47332%, 63.58040%, and 49.40555%, respectively. The examiner treated the entire amounts advanced by American to 195 Broadway Corporation as gross assets employed in American's business in New York.

22. 195 Broadway Corporation is a wholly-owned subsidiary of American and had its principal office at 195 Broadway, New York, New York. It was incorporated in 1930 under the laws of the State of New York. During the years 1969 through 1972, 195 Broadway Corporation owned, leased and managed real property and related tangible personal property in New York and New Jersey for the benefit of American's general administrative departments. Except for transportation equipment (aircraft and motor vehicles), this property consisted almost entirely of office facilities and did not include any telephone plant. 195 Broadway Corporation's revenue consisted of rentals paid by American and other Bell System companies (e.g., Western Electric Company rented office space at 195 Broadway), amounts of rent paid by non-Bell System parties (e.g., street level space at 195 Broadway was rented by several stores and a bank), restaurant receipts from the operation of cafeterias at the various office locations, and other miscellaneous receipts. American's rental payments to 195 Broadway Corporation were in amounts equal to 195 Broadway Corporation's operating

expenses less its revenue from other sources and did not enable 195 Broadway Corporation to repay the amounts advanced by American. Funds consisting of operating expenses which did not require cash expenditures (i.e., depreciation and amortization), American's contributions to capital and advances, and proceeds from various sales of real estate were used for additions to real estate and equipment (principally, the Raritan River Center complex and the Basking Ridge complex, both of which are located in New Jersey). 195 Broadway Corporation has never paid dividends to American since it began operations in 1931. 195 Broadway Corporation was not regulated by either the Federal Communications Commission or the New York State Public Service Commission, and was a business corporation subject to tax in New York under Article 9-A.

23. American's advances to 195 Broadway Corporation were on open account and were not evidenced by any instrument. All advances were free of interest. All decision-making processes in regard to advances to 195 Broadway Corporation were made in New York City.

24. Amounts advanced to 195 Broadway Corporation were repaid only out of contributions to its capital made by American or sales of stock to American.

25. The examiner treated amounts due American from affiliated companies recorded in its Account 120.1 as "accounts receivable" employed in American's business in New York and everywhere, for purposes of the Capital Stock tax as follows:

- | | |
|---|------------------|
| (a) taxable year beginning January 1, 1970: | \$7,071,144; |
| (b) taxable year beginning January 1, 1971: | \$7,559,583; |
| (c) taxable year beginning January 1, 1972: | \$5,586,658; and |
| (d) taxable year beginning January 1, 1973: | \$3,880,618. |

Included in such amounts was interest on the amounts advanced by American to its telephone subsidiaries located wholly outside of New York, as described in paragraphs 16 through 19. The amounts in dispute are as follows:

- (a) taxable year beginning January 1, 1970: \$5,697,765;
- (b) taxable year beginning January 1, 1971: \$6,168,599;
- (c) taxable year beginning January 1, 1972: \$4,239,554; and
- (d) taxable year beginning January 1, 1973: \$2,410,160.

26. In accordance with section 31.120.1 of the Uniform System of Accounts, amounts due from affiliated companies on all transactions are included in Account 120.1 which is a balance sheet account in which entries are made as of the last day of the month. With respect to each month of the years 1969 through 1972, American included in Account 120.1, as of the end of the month, the amounts due from each telephone subsidiary, including the amounts of interest which had accrued on the last day of the month and which were payable in New York City within the first ten days of the succeeding month with respect to outstanding advances. During the years 1969 through 1972, interest on all advances was paid on the tenth day of the succeeding month except when such date was a holiday in which event the interest was paid on the last business day in the ten day period.

27. American received interest in New York from its affiliated corporations which are located wholly outside New York State (the telephone subsidiaries and Transpacific) as follows:

- (a) period ended December 31, 1969: \$17,525,586;
- (b) period ended March 31, 1970: \$13,404,249;
- (c) period ended June 30, 1970: \$14,707,498;
- (d) period ended September 30, 1970: \$26,014,597;
- (e) period ended December 31, 1970: \$19,685,862;
- (f) period ended March 31, 1971: \$13,895,644;
- (g) period ended June 30, 1971: \$10,865,013;
- (h) period ended September 30, 1971: \$15,395,867;
- (i) period ended December 31, 1971: \$13,159,672;
- (j) period ended March 31, 1972: \$ 6,631,388;
- (k) period ended June 30, 1972: \$ 7,705,255;
- (l) period ended September 30, 1972: \$ 4,969,457; and
- (m) period ended December 31, 1972: \$ 7,264,190.

The examiner treated these amounts as earnings from sources within New York State for purposes of the Gross Earnings tax. (The examiner's report incorrectly

characterizes interest which American reported on its Gross Earnings reports from New York sources as having been derived in connection with advances. In fact, this interest consists of amounts paid by New York Telephone Company to American's Long Lines Department in connection with the settlement of obligations incurred in the construction of telephone plant by the Long Lines Department on behalf of New York Telephone Company.)

28. American maintains several types of cash accounts. Account 113, Cash, includes the amounts of current funds deposited in banks which are available for use on demand and from which current operating expenses are paid. Account 114, Special Cash Deposits, includes amounts of cash required to be kept in special deposit accounts to meet current obligations and cash deposited to insure the performance of certain types of contracts. Account 115, Working Funds, includes amounts of cash advanced to cashiers and other employees which are used to handle the minor daily cash transactions of the business. These cash accounts do not produce any earnings. The amounts in these accounts were properly excluded as cash from the allocation schedule in computation of the Capital Stock tax.

29. Account 116, "Temporary Cash Investments," is a central "pool of funds" maintained by American and includes the book cost of securities acquired for the purpose of temporarily investing funds not presently used in operations.

30. American went to the financial market for the purpose of raising the long-term capital needed by the Bell System to meet its construction program. Because it was neither practical nor economical to obtain long-term funds on a day-by-day basis, each offering of American's securities involved substantial sums in order to support American's and its subsidiaries' needs for a reasonable period of time. The receipt of this capital in large amounts resulted in a

level of funds which could not be used immediately. During the interim, such funds were not held idle, but instead were temporarily invested in short-term securities with the objective of getting the highest yield consistent with security and liquidity.

31. The total book cost of American's investments in Account 116 at the beginning of each of 1969, 1970, 1971 and 1972, the total book cost of the investments in Account 116 made during each of such years, the total book cost of the investments in Account 116 which were disposed of during each of such years and the total book cost of the investments in Account 116 at the end of each of such years were as follows:

	<u>Investments at Beginning of the Year</u>	<u>Investments Made During the Year</u>	<u>Investments Disposed of During the Year</u>	<u>Investments at End of the Year</u>
1969	\$ 618,202,734	\$5,831,198,602	\$5,796,201,166	\$ 653,200,171
1970	653,200,171	6,369,861,557	5,952,826,359	1,070,235,368
1971	1,070,235,368	6,179,601,063	6,312,992,397	936,844,034
1972	936,844,034	7,018,873,286	6,812,567,753	1,143,149,567

The turnover in all of the "Temporary Cash Investments" in American's Account 116 (the average of the investments bought and disposed of during the year divided by the average of the investments held at the beginning and end of the year) was as follows:

1969 - 9.2 times or once every 1.3 months
1970 - 7.4 times or once every 1.6 months
1971 - 6.2 times or once every 1.9 months
1972 - 6.7 times or once every 1.8 months

32. All of American's "Temporary Cash Investments" were readily marketable to insure the ready availability of funds. American's dispositions of its temporary cash investments, whether at maturity or by sale in a secondary market, were always settled on the same day as the date of the transaction so that American always received payment therefor on such date. (This varies from the general practice of settling transactions in short-term investments on the next full business day following the day of transaction.)

33. A portion of American's "Temporary Cash Investments" was segregated for use outside of New York State. Whenever American had a new debt or stock issue, the monies received from the issue were invested in temporary cash investments specifically segregated for use only as advances to or equity investments in subsidiaries outside of New York or as equity investments in Western Electric Company, Incorporated and Bell Telephone Laboratories, Incorporated. The purchase tickets representing such temporary cash investment items were marked by American's Treasury Department with the notation "segregated funds" and such tickets were also kept separate from all other purchase tickets. American's Comptrollers Department established a separate binder for each issue of American's debt and stock during 1969 through 1972 in which it recorded the receipt of the proceeds from such issues, the temporary cash investment items purchased with the proceeds, and the advances or equity investments to American's subsidiaries, except New York Telephone Company, charged to such issue. When the advances were repaid, the sums repaid were invested and placed in the general pool of funds for use within and without New York.

34. The pool of funds in American's Account 116 constituted the central source from which advances of cash were made to the telephone subsidiaries in accordance with their needs. The advances made to any one telephone subsidiary

were in amounts which were not large enough to justify its approaching the capital market. When the buildup of advances to a telephone subsidiary reached a point where permanent financing was desirable, the telephone subsidiary sold its securities (to either the public or American) and repaid the advances. When a telephone subsidiary sold securities to the public and repaid advances, cash returned to the pool. The sale of subsidiary stock to American generally did not add to the pool since settlement was accomplished by reducing the subsidiary's outstanding obligations to American.

35. During the years 1969 through 1972, American advanced to or invested in its subsidiaries outside of New York the following sums of money out of the proceeds from the sale of its securities to the public which were segregated:

1969	-	-0-
1970	-	\$1,715,361,760
1971	-	\$1,926,339,086
1972	-	\$1,494,712,254

36. Management of the pool of funds rested with American's Treasury Department at 195 Broadway, New York, New York, and custody and records of all the "Temporary Cash Investments" owned by American were maintained there. The Treasury Department has a full-time staff of people to manage these investments. It was the responsibility of American's Treasury Department to select the new purchases of temporary securities having appropriate maturities and the present holdings of securities to be sold. Tentative investment plans were prepared and periodically reviewed there. The telephone subsidiaries and the Long Lines Department of American maintained contact on a day-to-day basis with the Treasury Department with regard to the funds that were needed or were to be

repaid so that American's Treasury Department could make the most advantageous transactions for securities to be brought or sold.

37. The examiner treated American's "Temporary Cash Investments" consisting, in part, of loan participation notes, commercial paper, documented discount notes, bankers' acceptances, Federal National Mortgage Association debentures and discount notes, obligations of New York State and New York municipalities, and obligations of other states and other municipalities as capital employed in New York for purposes of the Capital Stock tax. These are the temporary cash investments at issue herein. The Corporation Tax Bureau has conceded that Federal Intermediate Credit Bank bonds, Banks for Cooperatives bonds and Federal Home Loan Bank bonds were obligations issued by the United States. The balance of American's "Temporary Cash Investments" consisting of bank certificates of deposit were treated by the examiner in his audit report as cash and are not at issue herein.

38. A loan participation note is a certificate which evidences an undivided interest in a stated amount in a pool of certain, segregated loans owned by a bank and identified on its books and records as participation loans. The principal amount of the pool equals or exceeds the aggregate amount of all outstanding participations in the pool. The bank retains all payments of principal and interest received on the underlying loans which constitute the pool. The loan participation note is accompanied by the bank's unconditional agreement to repurchase the note at a certain date at a stated price which reflects interest. During 1969, American held three loan participation notes with a face value of \$5 million each: (1) Citizens and Southern National Bank of Atlanta, Georgia, (2) The National Shawmut Bank of Boston, Massachusetts, and (3) The Industrial National Bank of Providence, Rhode Island.

39. In general, commercial paper is short-term unsecured promissory notes issued by banks, finance companies and industrial companies in bearer form and sold on a discount basis (only a small portion of the commercial paper held by American during the years 1969 through 1972 was interest bearing). Commercial paper issued by banks and finance companies was generally purchased directly from the issuers. The balance of the commercial paper acquired by American during the years 1969 through 1972 was purchased from commercial paper dealers. Although no secondary market for commercial paper exists, it is generally accepted that issuing companies and commercial paper dealers will repurchase outstanding paper before maturity if requested by the holder. Much of the commercial paper acquired by American during the years 1969 through 1972 was held until maturity for less than thirty days, most was held for less than sixty days and virtually none was held beyond ninety days. Payment at maturity was effected by presentation to the bank designated as paying agent on the face of the note.

40. A documented discount note is a short-term commercial note issued in bearer form on a discount basis and accompanied by a letter of credit from the bank. The letter of credit constitutes the bank's absolute obligation to pay the face amount of the note in the event of default by the obligor. Documented discount notes were generally purchased from commercial paper dealers. Many of the documented discount notes owned by American during the years 1969 through 1972 were held until maturity for less than thirty days, most were held for less than sixty days and virtually none were held beyond ninety days. Payment at maturity was effected by presentation to a corresponding bank (which in turn was paid by the bank issuing the letter of credit). Documented discount notes issued by companies located outside of New York State were accompanied by

letters of credit from banks which were also generally located outside of New York State.

41. Bankers' acceptances are time drafts drawn on and accepted by a bank. They generally originate in import transactions. An American importer, after negotiating with a foreign exporter, arranges with his American commercial bank for the issuance of an irrevocable letter of credit in favor of the exporter. The exporter, in conformity with the terms of the letter of credit, draws a time draft on the American bank and negotiates the draft with his corresponding bank, receiving immediate payment. The corresponding bank then forwards the draft to the United States for presentation to the bank that issued the letter of credit. This bank stamps the draft "accepted" - the American bank has accepted an obligation to pay the draft at maturity. Once the instrument is accepted, the American bank substitutes its own credit for that of the drawer, the draft becoming an acceptance, and representing a negotiable money-market instrument. The accepting bank may either elect to hold the instrument, sell it directly to investors, or discount it with a bankers' acceptance dealer for subsequent sale to investors. Accordingly, there is an active secondary market in this instrument. If the acceptance is sold, it is presented to the American bank for payment by its holder at maturity. A bankers' acceptance constitutes an irrevocable primary obligation of the acceptance bank, and in the sixty years of usage in the United States, there has been no known principal loss to an investor. Most of the bankers' acceptances acquired by American during the years 1969 through 1971 were held until maturity for less than thirty days and virtually none were held beyond sixty days.

42. The Federal National Mortgage Association (hereinafter referred to as FNMA) is a Federally Chartered Corporation which was first chartered in 1938

and was rechartered in 1954 by the Federal National Mortgage Association Charter Act (Title III of the National Housing Act, and amended) and was reorganized in 1968. It is subject to regulation by the Secretary of Housing and Urban Development. The Charter Act authorized FNMA to render supplementary assistance to the secondary market for Federally guaranteed or insured residential mortgages. During the years 1969 through 1972, FNMA purchased residential mortgages insured or guaranteed by the Federal Housing Administration, the Farmers Home Administration and the Veterans' Administration. On February 14, 1972, in accordance with the authorization of the Secretary of Housing and Urban Development, FNMA began to also deal in conventional mortgages which were not Federally insured or guaranteed. FNMA's operations are closely regulated, and it may lend money to or purchase mortgages only from an approved list of borrowers and mortgage sellers (mortgage companies, savings and loan associations, life insurance companies, and Federal agencies authorized to both sell mortgages and acquire FNMA stock) who, in connection with their loans and mortgage sales, are required to subscribe to FNMA's common stock in amounts related to the loan and sales transactions. In order to raise the capital needed to finance its loans and mortgage acquisitions, FNMA is authorized to sell its obligations to private investors. FNMA short-term discount notes are issued in bearer form on a discount basis. FNMA debentures are issued in bearer form. The Charter of FNMA contains no specific exemptions of these securities from state taxation. Both types of obligations are issued through a fiscal agent located in New York City in the same manner as the Federal Home Loan Banks and other Federal agencies issue their securities. FNMA obligations and the securities of the Export-Import Bank, the Federal Housing Administration, the Government National Mortgage Association, the Tennessee Valley Authority, the Banks for Cooperatives,

the Farmers Home Administration, the Federal Home Loan Banks, the Federal Intermediate Credit Banks, the Federal Land Banks, and the District of Columbia Armory Board are treated by the financial community as constituting the "government securities market." Unlike FNMA stock certificates, FNMA obligations are required by statute to bear a legend to the effect that they "are not guaranteed by the United States and do not constitute a debt or obligation of the United States or of any agency or instrumentality thereof other than the corporation." Government security transactions are handled by approximately twenty dealers who make markets by standing ready to quote buying and selling prices for all government securities traded in the market. The obligations issued by FNMA may be accepted as security for fiduciary, trust and public funds under the control of the United States or any officer or officers thereof. FNMA's debentures are also eligible as collateral for Treasury tax and loan accounts and banks may deal in them without regard to the statutory limitations and restrictions generally applicable to investment securities. Most of the FNMA obligations acquired by American during the years 1969 through 1971 were held for approximately six months.

43. American owned New York State and New York municipal obligations which were generally held until maturity for a period of approximately six months to one year. The examiner treated these New York State and New York municipal obligations owned by American as gross assets employed in American's business within New York and everywhere. They consisted of obligations of New York State and New York Municipalities as follows:

	<u>1969</u>	<u>1970</u>	<u>1971</u>	<u>1972</u>
New York State	\$10,878,349	\$ 3,732,074	\$2,468,456	\$15,457,890
New York Municipalities	<u>15,437,290</u>	<u>16,219,019</u>	<u>2,018,035</u>	<u>-</u>
TOTAL	\$26,315,639	\$19,951,093	\$4,486,491	\$15,457,890

With the exception of a New York State Job Development Authority note held in 1972 with an average annual market value of \$678,711, all of the New York State obligations were either tax anticipation notes or bond anticipation notes. The obligations of New York municipalities were obligations of various cities, counties or districts.

44. American owned non-New York municipal obligations which were generally held until maturity for a period of approximately six months. The examiner treated these obligations of states and municipalities outside of New York as gross assets employed in American's business within New York and everywhere.

45. In accordance with section 31.121 of the Uniform System of Accounts, American maintained Account 121 for interest receivable. Account 121 is an asset account in which unpaid interest which has accrued to the last day of a month was entered as of the last day of the month. The examiner treated interest receivable in connection with obligations of three United States agencies (Federal Intermediate Credit Bank, Banks for Cooperatives, and Federal Home Loan Bank), refunds of Federal income tax, obligations of New York State and its municipalities, obligations of states and municipalities outside New York, and commercial paper held by American as gross assets employed in American's business in New York and everywhere, and therefore included such interest receivable in the numerator and denominator of American's New York allocation percentage for purposes of the Capital Stock tax. The examiner computed the amount of interest receivable, by adding the total amounts in Account 121 for

each month in each of the years 1969 through 1972 and dividing such amounts by 12. The amounts of interest receivable attributable to obligations of New York State and New York Municipalities were as follows:

	<u>1969</u>	<u>1970</u>	<u>1971</u>	<u>1972</u>
New York State	\$ 528,020	\$ 231,425	\$ 61,772	\$97,940
New York Municipalities	<u>749,305</u>	<u>1,005,738</u>	<u>50,500</u>	<u>-</u>
TOTAL	\$1,277,325	\$1,237,163	\$112,272	\$97,940

46. The interest receivable from obligations of United States agencies related to American's temporary investment in Federal Intermediate Credit bonds, Banks for Cooperatives bonds and Federal Home Loan Bank bonds. The Corporation Tax Bureau has conceded that all three types of bonds were themselves exempt from inclusion in either the numerator or denominator of American's New York allocation percentage for purposes of the Capital Stock tax as obligations of the United States. Furthermore, the Corporation Tax Bureau has conceded that the interest received on all three types of bonds was exempt from tax under the Gross Earnings tax as income from obligations of the United States.

47. The interest receivable with respect to the refunds of Federal income tax related to refund claims filed by American for the years 1947, 1948 and 1949. The issue involved in the refund claims was the correct method for calculating the earnings and profits of several subsidiaries in order to determine whether certain distributions made by the subsidiaries in 1947, 1948 and 1949 constituted taxable dividends. In December, 1970, agreement with the Internal Revenue Service was reached with respect to certain elements in the computation of the earnings and profits which would have produced an estimated refund of tax of approximately \$1,500,000 and interest thereon of approximately \$1,800,000. The amount of tax to be ultimately refunded was subject to further

negotiation with the Internal Revenue Service with respect to certain elements in the computation which were still in dispute, and thereafter, to the approval of the Joint (Congressional) Committee on Internal Revenue Taxation as required by Section 6405 of the Internal Revenue Code. Final agreement with the Internal Revenue Service and the requisite Joint Committee approval were not secured until 1974, and refunds of tax in the total amount of \$1,610,905.76 and interest thereon in the amount of \$2,439,952.66 were made in 1975. In December, 1970, American recorded in Account 121 interest receivable with respect to the estimated Federal income tax refunds in the amount of \$1,800,000, and thereafter increased such amount monthly by \$7,500 until payment in 1975. The Corporation Tax Bureau has conceded that this interest is exempt from the Gross Earnings tax as income from obligations of the United States.

48. The examiner treated certain interest income from commercial paper, documented discount notes, bankers' acceptances, Federal National Mortgage Association debentures and discount notes, and certificates of deposit as earnings from within New York State for purposes of the Gross Earnings tax. These amounts were in addition to amounts of interest from commercial paper, bankers' acceptances and certificates of deposit which American reported on its Gross Earnings tax reports for the periods involved.

49. In the case of interest on commercial paper, the examiner treated interest on commercial paper issued by obligors located outside of New York State as earnings from New York sources whereas American included on its Gross Earnings tax reports only the interest on commercial paper issued by obligors located inside New York State.

50. In the case of interest on documented discount notes, the examiner treated interest on those notes where the underlying commercial paper was

issued by obligors located outside of New York State as earnings from New York sources. American inadvertently omitted from its Gross Earnings tax reports interest from documented discount notes of obligors located in New York State, and concedes that the amounts from New York obligors were subject to the Gross Earnings tax.

51. In the case of interest from bankers' acceptances, the examiner treated interest on drafts which had been accepted by banks located outside of New York State as earnings from New York sources whereas American included on its Gross Earnings tax reports only the interest from those bankers' acceptances for which the accepting bank was located in New York State.

52. In the case of interest from FNMA debentures and discount notes, the examiner treated the entire amount of such interest as earnings from New York sources whereas American did not include any part of such interest on its Gross Earnings tax reports as earnings from New York sources.

53. Certificates of deposit are negotiable certificates issued by commercial banks against funds deposited in such banks for a definite period of time and earn a specific rate of return. The examiner treated interest from certificates of deposit issued by banks located outside of New York State as earnings from New York sources whereas American included on its Gross Earnings tax reports only the interest from those certificates of deposit which were issued by banks located in New York State.

54. In accordance with section 31.121 of the Uniform System of Accounts, American maintained Account 121 for "dividends receivable." Account 121 is an asset account in which entries were made as of the last day of each month. Dividends were recorded in Account 121 as a receivable if the dividend record date fell within the month and the dividend payment date was subsequent to the

close of the month. If the dividend record date and the dividend payment date fell within the same month, there was no dividend receivable for purposes of Account 121 and no entry in Account 121 was made.

55. The examiner treated "dividends receivable" as gross assets employed in American's business for purposes of the Capital Stock tax. The examiner treated "dividends receivable" from New York Telephone Company and Western Electric, Incorporated, determined on the basis of their New York State stock allocation percentages, as gross assets employed in American's business in New York for purposes of the Capital Stock tax.

56. In the case of wholly-owned companies, dividends were frequently declared on the record date or the day preceding the record date, and in any event, almost always within one week of the record date. In the case of the other companies, dividends were generally declared from three to five weeks prior to the record date.

57. In accordance with section 31.312 of the Uniform System of Accounts, American maintained Account 312, Dividend Income, which is an income account. As provided by section 31.312(b), dividends were not "credited to this account before actual collection, unless their payment was reasonably assured by past experience, guaranty, anticipated provisions, or otherwise."

58. The examiner computed the amount of "dividends receivable" which was includible in the denominator of American's New York allocation percentage for each of the years 1969 through 1972 by dividing the total amount of dividends recorded in American's Account 312 for each of such years by 12. The examiner computed the amount of "dividends receivable" which were includible in the numerator of American's New York allocation percentage by multiplying the dividends which American received from New York Telephone Company and Western

Electric Company, Incorporated, as recorded in Account 312, by their New York State stock allocation percentages and then dividing the resulting figures by 12.

59. With the exception of New York Telephone Company and Western Electric Company, Incorporated, all of the companies from which American received dividends in the years 1969 through 1972 were located wholly outside New York State.

CONCLUSIONS OF LAW

A. That section 183 of the Tax Law imposes upon every domestic corporation principally engaged in a telephone and/or telegraph business, an annual tax computed on the basis of the amount of its capital stock within this State during the preceding year, for the privilege of exercising its corporate franchise or of holding property in this State. The measure of the amount of its capital stock within New York is determined as follows:

"The measure of the amount of capital stock in this state, except as hereinafter provided, shall be such a portion of the issued capital stock as the gross assets, exclusive of obligations issued by the United States and cash on hand and on deposit, employed in any business within this state, bear to the gross assets, exclusive of obligations issued by the United States and cash on hand and on deposit, wherever employed in business." Section 183.2.

B. That petitioner's advances to subsidiaries, evidenced by interest-bearing demand notes or on open account, which were made in furtherance of petitioner's principal business, to wit, the furnishing of telecommunications services, were properly deemed assets employed in business in New York for purposes of section 183. Indeed, petitioner stated that its primary activity consisted in the financing of its subsidiary companies. All of petitioner's decision-making processes relating to such advances transpired at petitioner's

principal office in New York City, and the loans were managed and controlled from said office. Where the loans were evidenced by notes, the notes were held at petitioner's Treasury Department in New York City. And, interest on the advances was payable at petitioner's New York office. These advances had a situs in New York (Burke v. Wells, 184 N.Y. 275, aff'd, 208 U.S. 14 (1908); Edison Electric Light Co. v. Campbell, 138 N.Y. 543 (1893)), were integrally tied to petitioner's business and were assets employed in petitioner's business in this State. This result is not changed by reason of the subsidiaries' location outside New York. David Williams Co. v. Sohmer, 151 A.D. 764 (3d Dept. 1912).

Similarly, interest receivable (accrued) on the advancements comprised an asset employed in petitioner's business in New York.

C. That in accordance with the rationale and holding of Conclusion of Law "B", advances made by petitioner to 195 Broadway Corporation were assets employed by petitioner in business within this State. Petitioner itself characterized these monies as "advances"; it cannot now attack such characterization and urge that the funds be treated as contributions to capital, subject to allocation.

"The fact that advancements to a corporation are made without requiring any evidence of indebtedness or fixing any date for repayment; without requiring the payment of any interest; and with the realization that the tangible assets of the corporation were not such, at any given time during the taxable period, as to repay any part of the loan -- was not a controlling consideration requiring a conclusion that the advances were not loans...". Byerlite Corp. v. Williams, 286 F.2d 285, 290-91 (6th Cir. 1960).

D. That petitioner's temporary cash investments, consisting of loan participation notes, commercial paper, documented discount notes and bankers'

acceptances, and any interest receivable therefrom, were assets employed in petitioner's business in this State.

In order to raise the long-term capital needed by the Bell System to meet its construction program, petitioner offered securities, each of which offering involved substantial sums. Capital was received in sufficiently large amounts that it could not be used immediately; during the interim, the funds were temporarily invested in short-term securities. Petitioner's Treasury Department (situated at its 195 Broadway office) had a full-time staff of employees who were responsible for managing the investments: they selected new purchases of securities with appropriate maturities and determined which of the holdings should be sold off.

These securities were hardly passive holdings in the form of unproductive investments. Union Ferry Co. of New York and Brooklyn v. Roberts, 66 A.D. 157 (3d Dept. 1901); Niagara River Hydraulic Co. v. Roberts, 30 A.D. 180, aff'd mem., 157 N.Y. 676 (1898). On the contrary, they were an indispensable adjunct to petitioner's activity of making advancements to affiliated corporations.

E. That the Federal National Mortgage Association debentures and discount notes held by petitioner were properly included in the numerator and denominator of the ratio calculated pursuant to subdivision 2 of section 183.

The aforementioned subdivision excludes from the ratio "obligations issued by the United States." However, subsection b of section 1719, Title 12 U.S.C., specifically declares that obligations issued by the Federal National Mortgage Association, a government-sponsored private corporation, are not obligations of the United States:

"The corporation Federal National Mortgage Association shall insert appropriate language in all of its obligations issued under this subsection clearly indicating that such obligations, together with the interest thereon, are not guaranteed by the United States and do not constitute a debt or obligation of the

United States or of any agency or instrumentality thereof other than the corporation."

See also Smith v. Davis, 323 U.S. 111 (1944); Hibernia Savings & Loan Society v. City and County of San Francisco, 200 U.S. 310 (1906); Opinion of Counsel, N.Y.S. Dept. of Taxation and Finance, December 22, 1975.

F. That in accordance with the Stipulation of Facts, by which the Commission considers itself bound, Servomation Corp. v. State Tax Commission, 60 A.D.2d 374, 378 (3d Dept. 1977), bonds of the Federal Intermediate Credit Bank, the Banks for Cooperatives and the Federal Home Loan Bank, and interest received thereon, were exempt from taxation under section 183.¹

G. That New York State and New York municipal obligations owned by petitioner, and interest thereon, were properly deemed gross assets employed in petitioner's business within New York and everywhere, though exempt from taxation by virtue of section 162.00 of the Local Finance Law or section 1807 of the Public Authorities Law.

It is well-settled that a franchise tax may permissibly include in its measure property otherwise tax-immune.

"The tax in the present case would not be affected if the nature of the property in which the whole capital stock is invested were changed and put into real property or bonds of New York, or of other States. From the very nature of the tax, being laid upon a franchise given by the State, and revocable at pleasure, it cannot be affected in any way by the character of the property in which its capital stock is invested." Home Insurance Co. of New York v. New York, 134 U.S. 365, 601 (1889).

¹ In light of 12 U.S.C. 1435 and 2155, which state that such bonds are not obligations of the United States, the holding of Conclusion of Law "F" is confined to the instant case and may not be applied in future audits or Commission decisions.

See also Educational Films Corp. v. Ward, 382 U.S. 379 (1930); Flint v. Stone Tracy Co., 220 U.S. 107 (1910); Monroe Co. Savings Bank v. Rochester, 37 N.Y. 356 (1867); 1908 N.Y. Att'y. Gen. Rep. 198.

Interest receivable with respect to obligations of states and municipalities outside New York is also includable in the measure of tax.

H. That interest receivable with respect to refunds to petitioner of Federal income tax, the amount of which refunds was not ultimately determined by the Internal Revenue Service nor approved by the Joint Congressional Committee on Internal Revenue Taxation until 1974, may not be included in the ratio calculated pursuant to section 183 for the years 1970 through 1973.

I. That dividends receivable, recorded by petitioner in Account 121 (in accordance with the Uniform System of Accounts, section 31.121), were assets employed in petitioner's business within the meaning of section 183. Dividends were recorded in said account as "receivables" if the record date fell within the month and the payment date was subsequent to the close of the month.

When a dividend has been declared, the relationship of debtor and creditor is established between the corporation and each stockholder for his proportion of the dividend. At any time after the date fixed for payment, the stockholder may maintain an action to recover the sum due, should the corporation refuse to pay. Gordon v. Elliman, 306 N.Y. 456 (1954); Godley v. Crandall & Godley Co., 212 N.Y. 121 (1914); Jaques v. White Knob Copper & Development Co., Ltd., 260 A.D. 640 (1st Dept. 1940); Searles v. Gebbie, 115 A.D. 778 (4th Dept. 1906). A dividend receivable thus constitutes a right to receive money, definite in time and amount, and enforceable at law.

New York Central & H.R.R. Co. v. Knight, cited by petitioner, is clearly distinguishable in that the dividends involved therein were "anticipated":

they had not yet been declared and were therefore a mere incident to the stock. 173 N.Y. 255, 263 (1903).

J. That the constitutionality of the laws of the State of New York is presumed at the administrative level of the State Tax Commission. Therefore, it must be presumed that the sections of the Tax Law which relate to the determination of petitioner's liability for additional taxes under Article 9 are constitutional.

K. That section 184 of Article 9 imposes upon transmission corporations an additional franchise tax equal to a prescribed percentage of the corporation's "gross earnings from all sources within this state, excluding earnings derived from business of an interstate character," for the privilege of exercising its corporate franchise or carrying on its business in such corporate capacity in New York.

L. That in accordance with the rationale and holdings of Conclusions of Law "B" and "D", interest income from advances to affiliated corporations and from petitioner's short-term investments constituted gross earnings from sources within the State.

The Third Department, in interpreting the predecessor of section 184, held as follows:

"By gross earnings, it seems to me, that the statute means all receipts arising from or growing out of the employment of its capital, whether that capital is employed in the transportation and transmission business or otherwise." New York Central & H.R.R.R. Co. v. Roberts, 32 A.D. 113, 115 (1898).

Interest income which arose from assets employed by petitioner in its business in this State comprised earnings from New York sources.

M. That the aforementioned interest from advancements was not derived from business of an interstate character, subject to the exclusion set forth in

subdivision 1 of section 184. Said exclusion had its origin in section 11, Chapter 562 of the Laws of 1894, which amended section 6, Chapter 361 of the Laws of 1881. The apparent purpose of the amendment was to overrule Dunkirk, A.V. & P.R.R. Co. v. Campbell, 74 Hun. 210 (1893) and to prevent the inclusion under section 184 of gross receipts derived from operations across state lines. It may be concluded from an examination of the language of Chapter 562 and the purpose thereof that the interest income in dispute was not of the kind sought to be excluded.

N. That interest income from Federal National Mortgage Association debentures constituted earnings properly subject to tax under section 184.

O. That the petition of American Telephone and Telegraph Company is granted to the extent indicated in Conclusions of Law "F," "H" and "I"; that the deficiencies issued December 24, 1975 are to be modified accordingly; and that, except as so modified, said deficiencies are in all other respects sustained.

DATED: Albany, New York

NOV 13 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER